IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 438.

ORDER OF RAILWAY CONDUCTORS OF AMERICA, an unincorporated Association, *Petitioner*,

v.

SOUTHERN RAILWAY COMPANY, a corporation organized and existing under the laws of the State of Virginia, *Respondent*

On Writ of Certiorari to the Supreme Court of the State of South Carolina.

REPLY BRIEF FOR THE PETITIONER.

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Respondent concedes that even as a condition precedent to invoking the jurisdiction of a state court, it would be necessary for that court first to determine that the dispute has been "handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes" and that every reasonable effort had been made by the parties to settle the dispute by negoti-

ation (Sec. 3(i) and Sec. 2 First of the Railway Labor Act).

Accordingly, respondent asserts at page 4 of its brief, as a basis for state court jurisdiction, that the claim "had been appealed to the highest officer of the carrier and had been formally rejected" and then concludes, based upon this assertion, that "nothing remained to be done, at the time this suit was filed, to enable the parties to submit the dispute to the courts or to the National Railroad Adjustment Board, as they, or either of them, might elect."

The only "formal" rejection that appears in this record in regard to the numerous claims filed by the various individual conductors (Plaintiff's Exhibits Nos. 1 *et seq.* shown at R. 417-419) is the letter of December 19, 1944, written by a Mr. Cox, one of the members of the staff of Mr. C. D. Mackay, Assistant Vice President in Charge of Labor Relations, to petitioner's general chairman, declining payment of the first two "time claims" filed by Conductor Lloyd for September 7 and 9, 1944. (R. 162-163; Plaintiff's Exhibit No. 1 at R. 417-418)

That Mr. Cox himself did not regard this so-called "formal rejection" as the end of negotiations, even in regard to the Lloyd claim, is shown by the fact that *negotiations thereafter continued concerning this identical claim as well as for settlement of the entire dispute.*[1] (R. 163-168) Mr. Cox wrote to General Chairman Lawrence on March 23, 1945, inviting a further statement of the organization's position (R. 164-166). On March 30, 1945, Mr. Cox again wrote to General Chairman Lawrence in which he made reference to a conference on March 28, 1945 concerning the Lloyd claim (R. 167). In his letter of March 30, 1945, Mr. Cox stated that further efforts would be made toward settlement of the dispute, saying: (R. 167)

> "You (General Chairman Lawrence) stated at the beginning of the discussion that you had appealed

[1] Emphasis ours unless otherwise indicated.

> *certain other similar claims* to General Manager Adams and that he had not, up to the present time, replied to your letter. Under these circumstances, as these claims were not then before me, we did not discuss them in detail. We did, however, discuss the matter in a general way *and agreed to look into the matter further with the view of seeing whether or not a settlement can be reached.*"

Mr. Cox also testified that further conferences were held and said that he did not know whether his letter to General Chairman Lawrence of March 30, 1945, (Plaintiff's Exhibit 10 at R. 166-168; 433) was the final letter written on this matter, stating on direct examination (R. 166):

> "Q. I hand you Plaintiff's Exhibit 10 (the letter of March 30, 1945) and ask you if that is the final letter written in the matter.
>
> "A. I can't say, Colonel, it was the final letter written in connection with this matter; because some more claims were appealed, as I recall it, *and subsequent conferences were held.*"

Petitioner's General Chairman was not only engaged in processing each "time claim" through the various officers on the Southern Railway, but was also attempting to obtain a settlement of the entire controversy (R. 167, 318, 400-401). Various individual conductors were filing "time claims" up to and including the date of commencement of this suit on July 12, 1945 (R. 418-419). Obeying the mandate of the Railway Labor Act and in accord with the terms of the collective agreement, General Chairman Lawrence continued to handle each "time claim" with the various officers of the carrier both before and after commencement of suit (R. 321-324). Provision for "time claims" is made in Article 30 of the collective agreement (Plaintiff's Exhibit 12 at page 63), and prompt handling *of each claim* was necessary in order to prevent its bar under the 60-day limitation of Article 32 of the agreement (Plaintiff's Exhibit No. 12 at page 64).

Conferences and discussions were continuing both before and after suit was instituted (R. 211, 400). There was no "formal" rejection of the "time claims" of the other individual conductors. Nevertheless, the decree of the trial court included all such claims, whether or not the claims had been processed to the highest operating officer, as well as all "future claims" (R. 527-528).

Respondent would apparently leave it to the state court to determine as a fact whether the parties in good faith had exercised every reasonable effort to adjust the controversy and whether each claim in controversy had been processed through negotiation to the highest operating officer, and had been "formally" rejected, before the court would entertain jurisdiction of the subject matter.

In each case of this kind, a fact issue would therefore be presented as to whether the parties had exhausted their mandatory obligation of collective bargaining. If state court jurisdiction is merely dependent upon a "formal" rejection, the carrier would always be in a position to win the race as between the adjustment board and the court. It would need only to deposit a formal rejection in the mails and immediately thereafter institute suit in the forum of its choice. A situation more fraught with possibilities of industrial strife can scarcely be imagined.

I

In Division I of its brief respondent argues that this Court, in *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, held that The Railway Labor Act does not exclude ordinary judicial jurisdiction for the "enforcement" of rail collective bargaining agreements.

We have discussed the *Moore* case at length in our main brief. At pages 11 to 13 of its brief, respondent argues that unless it be held that courts have concurrent jurisdiction with the adjustment Board a discrimination will exist as between a railroad employer and its employees.

This is indeed a surprising argument in view of the decision of this Court, in *Order of Railway Conductors* v. *Pitney*, 326 U. S. 561, which *denied* the right of a rail bargaining agent to seek judicial enforcement of its agreement with a railroad carrier prior to the submission of the dispute concerning its interpretation to the National Railroad Adjustment Board. Certainly this Court did not intend to deny the right of judicial relief to the bargaining representative, yet leave it subject to similar suits by the carriers.

Respondent's argument proceeds on an erroneous premise. Respondent makes the statement that this Court, in *Elgin, Joliet & Eastern R. Co.* v. *Burley*, 325 U. S. 711, 327 U. S. 661, held that the collective bargaining agent could act in the handling of claims under the contract "only to the extent authorized by the individual employees involved." This statement is immaterial in the present case. No one here questioned the petitioner's right to seek adjustment of the claims involved from respondent. Petitioner was seeking to recover and not compromise or relinquish the money "time claims", and for the craft as a whole was also trying to negotiate a settlement of the entire controversy out of which "time claims" arose. Its interest in such disputes was specifically noted in the *Burley* case.

After stating the ruling of this Court in the *Burley* case respondent arrives at the amazing conclusion that:

> "*It necessarily follows* that petitioner as a representative of conductor employees *is in no different position* with respect to the election of remedies than was the individual employee involved in the *Moore* case."

This conclusion is a *non sequitur*. It wholly ignores the decisions of this Court in which the difference has been pointedly stated. Remedies under the Railway Labor Act which may be clearly available both to the carrier and to the bargaining representative, may not always be available to the individual employee. *Steele* v. *L. & N. R. Co.*, 323 U. S. 192; and see our brief, pp. 24-27, 48-49.

It is clear that no discrimination exists as between carriers and bargaining representatives. Both have been denied access to the courts for interpretation of their agreements for the reason that Congress has specifically provided a comprehensive and inclusive procedure for the handling of their disputes. If Congress had believed that peaceful labor relations on interstate railroads could be maintained by judicial action, it would have found no reason to enact a different procedure in the Railway Labor Act.

II

In Division II respondent urges that all of the prior decisions of this Court interpreting the Railway Labor Act, except the *Moore* case, should be confined to narrow limits. The argument is that this Court has held certain administrative procedures to be exclusive but has provided others which are merely cumulative to existing legal remedies. In short, the respondent argues that Congress intended to provide an exclusive remedy in the National Mediation Board and a non-exclusive remedy in the Adjustment Board.

Nothing in the Act or in the previous decisions of this Court lends support to this contention. The contention flies in the face of repeated pronouncements of this Court that:

> "• • • Congress intended to go no further in its use of the processes of adjudication and litigation than the express provisions of the Act indicate."

The aim and purpose of Congress was to promote peace in rail industrial relations. As said in *Virginian Ry. Co.* v. *System Federation No. 40*, 303 U. S. 515:

> "More is involved than the settlement of a private controversy without appreciable consequences to the public."

Recognizing that judicial remedies suitable for determination of private controversies are not of aid in accom-

plishing the aim sought by Congress, it provided a comprehensive and all inclusive procedure for the adjustment, settlement and determination of rail labor controversies. That aim is not to be accomplished by finely wrought distinctions which would invite the parties to engage in a race as between the Adjustment Board and the Courts.

This Court has based its decisions in construing the Railway Labor Act on the well settled principle that where there is an available administrative remedy the parties should not be permitted to by-pass it and resort to judicial proceedings. Judicial intervention has been strictly limited to isolated situations in which the procedures of the Act could not provide the relief sought or rights under the Act would be lost in the absence of judicial enforcement.

The respondent attempts to distinguish the prior decisions of this Court, except the *Pitney* case, on the ground that these decisions turned on a narrow construction of the Railway Labor Act relative to creation of new rights and exclusive remedies therefor. On this theory, respondent argues that Congress created an exclusive remedy in the National Mediation Board but only a non-exclusive and cumulative remedy in the Adjustment Board. The invalidity of this distinction is demonstrated by respondent's conceded inability to reconcile the *Pitney* case with the narrow concept suggested by it.

The respondent nevertheless urges that the Congressional purpose in enacting the procedures provided in the Act be ignored; that this Court depart from the principles of its prior decisions; and that the Act be given a confusing and emasculating interpretation. The interpretation urged by respondent can only lead to chaos in the labor relations of the industry. Employees inevitably will resent the "game" proposed by respondent in which carriers and employee representatives would jockey for position as to which shall choose the forum for determination of disputed questions relating to interpretation and application of rail collective agreements.

It is submitted that a consideration of the Railway Labor Act as a whole conclusively negatives the thought that Congress left the parties to a race as between Adjustment Board and court or that Congress intended to make certain procedures exclusive and others non-exclusive.

III

Respondent next asserts that "the so-called doctrine of Primary Jurisdiction", frequently invoked by this Court in protection of Congressional intent in creating specialized administrative agencies, should not be applied to the National Railroad Adjustment Board.

Respondent states (Resp. Bf. p. 21) that "a complete answer" to petitioner's contention is the fact that the *Moore* and *Boswell* cases were decided by this Court subsequent to its decisions in *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U. S. 393, and *Mitchell Coal and Coke Co.* v. *Pennsylvania R. Co.*, 230 U. S. 247.

The *Moore* and *Boswell* cases were decided by this Court in 1941 and 1943, respectively.

Respondent implies that petitioner proposes the application of the doctrine of primary jurisdiction to the Railway Labor Act procedures as a new and startling innovation whereas in fact this Court cited the *Great Northern* and *Mitchell Coal* cases, *supra*, in support of its decision in the *Pitney* case *in 1946*. It would appear that respondent contends that everything said by this Court in the *Pitney* case, in applying the principle of the *Great Northern and Mitchell Coal* cases was meaningless.

We have fully discussed the *Moore* and *Boswell* cases in our brief at pages 43-52. It is appropriate to point out that in our main brief we indicated that in our view the decision in the *Moore* case is not inconsistent with the subsequent decisions of this Court. Respondent contends throughout its brief, that if petitioner is to prevail the *Moore* case must be "overruled or modified". If the *Moore* case is given the construction urged for it by respondent,

then we submit that it is not in harmony with the subsequent decisions of this Court interpreting the Railway Labor Act and particularly its decision in the *Pitney* case.

Further in regard to primary jurisdiction, respondent urges that this principle is only applicable for the protection of uniform railroad rates. It may be observed that this Court in *Order of R. Telegraphers* v. *Railway Express Agency*, 321 U. S. 342, said:

> "From the first the position of labor with reference to the wage structure of an industry has been much like that of the carriers about rate structures."

Both rates of pay and rules governing working conditions are generally negotiated between the carriers of the United States and representatives of their employees in *national* wage and rule conferences. It was this development toward national uniformity throughout the large interstate railroad systems of the United States that led Congress to create a *National* Adjustment Board and a *National* Mediation Board. As shown by the Congressional hearings on the Railway Labor Act, the principle of uniformity was a paramount one leading to the amendments of the Railway Labor Act in 1934.

Uniformity is, of course, one but not the only consideration in the application of the principle of primary jurisdiction. This Court has also recognized the Congressional purpose in creating a *specialized* board for determination of intricate factual matters in technical fields. The respondent's only reference to this element of Congressional intent is found at page 18 of its brief in which it states that the case at bar involved only "a simple controversy over the interpretation of a contract". In the trial court the respondent did not treat the issue as one so simple. Respondent sought to show customs and practices allegedly existing "since 1910" (R. 8, 79-86, 227, 230); to trace the history of the rules involved by reference to the orders and directives issued by the Director-General of Railroads in World War I (R. 172-183); and copious testimony was of-

fered on the meaning of technical railroad terms. (R. 88, 174-194, 221, 215-220, 228, 247, 249-252, 325-362, 397-398, 409-414).

IV

In Division IV, respondent seeks to find support for its contentions in the legislative history of the 1934 amendments to the Railway Labor Act.[2]

Respondent's quotation from House Report No. 1944 is confusing. Respondent's brief would appear to indicate that the statement in the House Report to the effect that "the bill does not introduce any new principles into the existing Railway Labor Act" had reference to *all* of the proposed amendments, *including* those creating the National Railway Adjustment Board.

Reference to the report from which the quotation is taken demonstrates that the first two quotations set forth in respondent's brief specifically related to the proposed amendments to Section 2 of the Act. The report indicates that there were six numbered paragraphs limited to a discussion of the reasons for the amendment to Section 2.

The statement in the report that the bill did not introduce any new principles into the existing Railway Labor Act *had reference only* to the fact that the amendments to Section 2 did not change the provisions of the 1926 Act with respect to methods of conference, mediation and voluntary arbitration for settlement of major disputes.

Under an entirely new caption relating to the amendments to Section 3 of the Act is found the last quotation from the report quoted at the foot of page 28 of Respondent's brief. This was paragraph 7 of the report and commenced as indicated with the statement:

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[2] The testimony of Mr. Joseph B. Eastman quoted at page 37 of the Brief for Petitioner appears at page 48 (not 47) of the hearings before the House Committee; and the second quoted paragraph appears at page 155 of the Hearings before the Committee on Industrial Commerce, United States Senate on S. 3266.

"The *second major purpose* of the bill is to provide *sufficient and effective* means for the settlement of minor disputes known as 'grievances', which develop from the interpretation and or application of the contracts between labor unions and the carriers, fixing wages and working conditions. * * *"

The part omitted from the quotation is material and is as follows:

"The present Railway Labor Act provides for the establishment of boards of adjustment by agreement. In many instances, however, the carriers and employees have been unable to reach agreements to establish such boards. Further, the present act provides that when and if such boards are established by agreement, the employees and the carriers shall be equally represented on the board.

"Many thousands of these disputes have been considered by boards established under the Railway Labor Act; but the boards have been unable to reach a majority decision, and so the proceedings have been deadlocked. These unadjusted disputes have become so numerous that on several occasions the employees have resorted to the issuance of strike ballots and threatened to interrupt interstate commerce to secure adjustment. This has made it necessary for the President of the United States to intervene and establish an emergency board to investigate the controversies. This condition should be corrected in the interest of industrial peace and of uninterrupted transportation service."

Following the conclusion of the further quotation from the report, as set forth in respondent's brief at page 29, the report proceeds with an analysis of the provisions of the proposed amendments relating to the creation and jurisdiction of the National Railroad Adjustment Board in subparagraphs (a) to (i) inclusive, the last paragraph being as follows:

"(i) Finally, the bill gives absolute freedom to the carriers and the employees to establish any other machinery upon which they may voluntarily agree. *If*

> *such voluntary machinery* should be established, *then* the parties are exempt from the jurisdiction of this National Board."

We respectfully submit that an examination of the legislative history and background of rail labor legislation clearly establishes that Congress in creating the National Railroad Adjustment Board intended to create a specialized agency having primary jurisdiction over controversies such as presented in the case at bar.

V.

Finally, respondent contends that the decree of the trial court did not interfere with petitioner's rights of collective bargaining. Respondent makes the suggestion, as it did in the trial court, that petitioner may bargain with respondent for a new contract. This suggestion begs the issue.

The pending controversy between petitioner and respondent related to the proper interpretation and application of an existing agreement. Both parties had the mandatory obligation of making every reasonable effort to settle this controversy in conference.

The trial court entered a decree which it described as settling this controversy. It is no answer for respondent to suggest that petitioner accept the decree and serve notice of intent to negotiate a new contract. Petitioner had that right before the decree. It also had the right before the decree to endeavor to settle the pending controversy, which right the decree destroyed.

Conclusion.

Respondent in footnotes to its brief has cited numerous decisions. None of these decisions, however, involve the specific issue now presented to this Court. Most of these

decisions were decided prior to *Order of Railway Conductors* v. *Pitney*, 326 U. S. 561. Furthermore, these cases did not involve actions brought by a carrier against a rail bargaining agent for a declaratory decree interpreting the collective agreement but were suits by individual employees and have no relevance to the issue in the case at bar.

Respondent bottoms its entire argument upon *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630. The contentions now urged by respondent were made to this Court in the Brief For Petitioner filed in the *Pitney* case, *supra*. At page 24 of that brief petitioner there urged:

> "Furthermore, this court held in *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630 and *Washington Terminal Co.* v. *Boswell*, 124 F. (2nd) 235 (App. D. C.), affirmed by this court in an equally divided opinion (319 U. S. 732) that such administrative remedies as are available through the adjustment board *are not exclusive and do not prevent the bringing of a court action under a contract.*"

In the petition for rehearing filed in the *Pitney* case, petitioner again argued that the suit could be maintained under the *Moore* case and stated that the decision in the *Pitney* case "* * * compels a statutory representative to seek relief in the hands of the adjustment board as a prerequisite to judicial relief *contrary to the principle announced by this Court in the Moore case.*"

Thus in the submission of the *Pitney* case, this petitioner argued to this Court, as respondent now does, that the Railway Labor Act merely provided a permissive remedy in the Adjustment Board, that this Court had determined in the *Moore* case that such procedure was not compulsory in nature or exclusive in character, and that there was no requirement that the parties seek an adjustment board de-

termination as a prerequisite to judicial relief. The same arguments made by respondent here were there urged to this Court and were there overruled.

We therefore submit that this Court accordingly held that the *Moore* case is not susceptible of the interpretation which petitioner in the *Pitney* case there sought to place upon it, and which respondent in the case at bar now urges.

Respectfully submitted,

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